

Service Date: July 25, 1989

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	
of the Montana Power Company for)	UTILITY DIVISION
Authority to Issue Not to Exceed)	
that Number of Shares of Preferred)	
Stock and Common Stock Which may)	DOCKET NO. 89.6.21
be Required to Permit the Exercise)	
and Exchange of Rights Pursuant to)	ORDER NO. 5418
a Shareholders' Rights Plan.)	

BACKGROUND

On June 28, 1989 the Montana Power Company (Applicant, Company or MPC) filed with the Public Service Commission (Commission) its verified Application, pursuant to Sections 69-3-501 through 69-3-507 of the Montana Code Annotated (1987) (MCA), seeking an order authorizing it to issue that number, not to exceed 600,000, of shares of Participating Preferred Shares, A Series (Preferred Shares), and not to exceed that number of shares of common stock (Common Shares) which, in each case, may be required to permit the exercise and exchange of rights pursuant to a common shareholders' Rights Agreement adopted by Applicant's Board of Directors (Board) on June 6, 1989 (Plan).

The Application is supported by exhibits and data in accordance with Commission practice and rules and regulations governing such transactions by public utilities operating within the State of Montana.

The Application states that Applicant is a public utility, as defined in Section 69-3-101, MCA, in that it furnishes electric and natural gas service in the State of Montana; that Applicant's principal business office is at 40 East Broadway, Butte, Montana; and that Applicant is qualified to do business in the States of Montana, Wyoming and Idaho. For detailed information with respect to the character of Applicant's business, reference is made to the Application and attached exhibits.

The Application further states that:

(1) The Plan was adopted by Applicant's Board on June 6, 1989. The Plan was adopted to protect all shareholders against any attempt to acquire control of Applicant by means of tactics that deny shareholders a full and fair price, and are not in the best interests of Applicant's shareholders, customers and employees and the residents of State of Montana. The Plan is not intended to and will not prevent an acquisition of Applicant at a full and fair price. However, it may cause substantial dilution to a person or group that acquires 20 percent or more of Applicant's voting stock.

Accordingly, the Plan should deter a potential acquiror from proceeding without the Board's approval.

(2) In adopting the Plan, the Board declared a dividend of one preferred share purchase right (Right) on each outstanding common share of Applicant. The dividend was paid June 16, 1989, to the shareholders of record on that date. Each Right entitles the holder, from the Distribution Date (as hereafter defined) until the earlier of June 6, 1989 and the redemption or exchange of the Rights, to purchase from Applicant one one-hundredth of a share of the Preferred Shares, at an exercise price of \$120, subject to certain adjustments.

(3) The Rights will be represented by the certificates for common shares and will not be exercisable or transferable apart from the common shares until the earlier to occur of (i) the date a person or group of affiliated or associated persons has acquired, or obtained the right to acquire, beneficial ownership of 20 percent or more of the outstanding voting shares of Applicant (an Acquiring Person) or (ii) the tenth day following the commencement of, or announcement of an intention to make, a tender offer or exchange offer, the consummation of which would result in the beneficial ownership by a person or group of 20 percent or more of such outstanding voting shares (the Distribution Date).

(4) In the event that (a) Applicant consolidates or merges with another person, (b) any person consolidates with or merges with or into Applicant where Applicant is the surviving corporation and all or part of the common shares are changed or exchanged, (c) 50 percent or more of Applicant's consolidated assets or earning power are sold, or (d) an Acquiring Person engages in certain

"self-dealing" transactions with Applicant, each holder of a Right will thereafter have the right to receive, upon the exercise thereof at the then current exercise price of the Right, that number of common shares of the Acquiring Person having an aggregate market value of two times such exercise price.

(5) In the event that any person becomes an Acquiring Person, each holder of a Right, other than Rights beneficially owned by the Acquiring Person (which will thereafter be void), will have the right to receive, upon the exercise thereof at the then current exercise price of the Right, that number of Common Shares or, at the option of Applicant, one one-hundredth of a Preferred Share, having an aggregate market value of two times such exercise price.

If there are insufficient authorized but unissued Common Shares or Preferred Shares to permit the exercise in full of the Rights, Applicant, at its option, may substitute, with respect to some or all of the Rights, cash, securities of Applicant and/or its subsidiaries, other assets or a combination thereof.

(6) The Rights will first become exercisable on the Distribution Date (unless sooner redeemed) and could then begin trading separately from the common shares. The Rights will expire on June 6, 1999, unless they are earlier redeemed or exchanged by Applicant as described below.

(7) At any time a person becomes an Acquiring Person and prior to the acquisition by such Acquiring Person of 50 percent or more of the outstanding common shares, the Board may exchange all but not less than all the Rights (other than Rights owned by such Acquiring Person which will have become void) at an exchange ratio per Right of (a) one Common Share, appropriately adjusted, or (b) cash, securities of Applicant and/or its subsidiaries, other assets

or any combination of the foregoing having a value equal to the market value of such Common Share at the time the Acquiring Person became such.

(8) At any time prior to a person becoming an Acquiring Person, the Board may redeem the Rights in whole, but not in part, at a price of \$0.01 per Right (the Redemption Price).

(9) Immediately upon the action of the Board electing to redeem or exchange the Rights, the right to exercise the Rights will terminate and the only right of the holders of Rights will be to receive the Redemption Price or the securities or assets to be received upon the exchange.

(10) The terms of the Rights may be amended in any respect without the consent of the holders of the Rights, prior to the date an Acquiring Person becomes such. Thereafter, the Plan may be amended in any manner not adverse to the interests of the holders of the Rights.

(11) Until a Right is exercised, the holder thereof, as such, will have no rights as a shareholder of Applicant, including, without limitation, the right to vote or to receive dividends.

(12) The exercise price payable, and the number of Preferred Shares or other securities or property issuable, upon exercise of the Rights are subject to adjustment from time to time to prevent dilution. The number of outstanding Rights and the number of one one-hundredth of a Preferred Share issuable upon exercise of each right are also subject to adjustment in certain circumstances.

(13) One one-hundredth of a Preferred Share is designed, to the extent possible, to be the equivalent of one common share. Preferred Shares purchasable upon exercise of the Rights will not be redeemable. No fractional Preferred Shares will be issued

(other than fractions which are integral multiples of one one-hundredth of a Preferred Share, which may, at the election of Applicant, be evidenced by depositor receipts) and, in lieu thereof, an adjustment in cash will be made based on the market price of the Preferred Shares.

(14) One Right was distributed to shareholders of Applicant for each common share owned of record by them on June 16, 1989. Until the Distribution Date, Applicant will issue one Right with each common share that shall become outstanding so that all common shares will have attached Rights. Applicant has initially authorized and reserved 600,000 Preferred Shares for issuance upon exercise of the Rights. As of May 31, 1989, there were 24,371,521 common shares issued.

(15) The present distribution of the Rights is not taxable to Applicant or its shareholders. The Rights are not dilutive, will not affect reported earnings per share, and will not weaken Applicant's financial strength, interfere with its business plans or adversely impact its utility service. Applicant will receive no proceeds from the issuance of the Rights.

(16) Applicant does not presently expect that the Rights will be exercised and be a source of additional capital or of a change in its capital structure. Plans like Applicant's Plan have been adopted by over 1,000 companies and have proven successful in deterring abusive and unfair takeover tactics. The Plan is designed to protect Applicant's shareholders, employees and customers and the residents of the State of Montana. Approval of this Application by the Commission will put Applicant's Plan on an equal footing with other rights plans.

(17) It is conceivable that the Rights might be exercised under certain circumstances. In such event, any proceeds received by Applicant will be used for the purposes allowed by Montana law.

The Application includes an opinion of counsel regarding the legality of the proposed issuances and an estimate of expenses, in the amount of \$1,763,900, which will be incurred in connection with the proposed issuances.

Notice of the filing of the Application was given by inclusion of notice thereof on the Commission Agenda for July 5, 1989.

DISCUSSION AND ANALYSIS

Section 69-3-501, MCA, sets forth the allowed purposes for which certain public utilities in Montana may "issue stocks and stock certificates and may issue, assume, or guarantee other securities payable at periods of more than 12 months," including:

- (a) the acquisition of property;
- (b) the construction, completion, extension, or improvement of its facilities;
- (c) the improvement or maintenance of its service;
- (d) the discharge or lawful refunding of its obligations;
- (e) the reimbursement of money actually expended for said purposes from income or from other money; or
- (f) any other purpose approved by the Commission.

Section 69-3-501(2), MCA.

As stated in the Application, the Shareholder Rights Plan (Plan) is intended to discourage the use of abusive or unfair takeover tactics, and is designed to deter an actual or threatened change in control of the Company that would not be in the best interests of shareholders or customers.

According to the Application, the Plan's existence encourages any person intending a takeover of the Company to negotiate with the Company's Board of Directors. The Plan is not intended to and will not prevent an acquisition of Applicant at a full and fair price, but was adopted to protect all shareholders against any attempt to acquire control of Applicant by means of tactics that deny shareholders a full and fair price.

The Commission believes that the proposed issuance of stock under the Plan will primarily allow the Company's management and its shareholders to insure that a full and fair price is received for outstanding stock. It will also allow the Company's management the opportunity to carefully evaluate any takeover attempt. The Commission finds these to be valid purposes under Section 69-3-501(f), MCA.

The purposes behind legislation such as that found in Title 69, Chapter 3, Part 5, MCA, are essentially twofold: First, the regulation of securities in this manner helps to protect

investors from overcapitalization; second, and in addition, proper securities regulation may also serve to protect the interests of ratepayers in assuring continued service without interruption from utilities and in receiving that service at reasonable rates.

The Application states that the issuance of securities under the Plan will not result in securities outstanding, in the aggregate, which exceed the fair value of the properties and business of the Applicant.

Although all of the possible scenarios resulting from the exercise of the Plan are difficult to predict, the Commission believes that the issuance of securities under the Plan will have little, if any, effect on the ratepayers. Therefore, the Commission is reluctant to interfere with the Applicant management's proposal, which is primarily designed to protect its shareholders. Although the Applicant's proposal, if exercised (which is unlikely), could result in substantial changes in Applicant's capitalization, the Commission does not believe that such changes will jeopardize either continuity of service or the receipt of that service at a reasonable rate. The Commission is confident that ratepayers can be insulated from any unreasonable rate impacts that might result.

The Commission notes that the Company's application did not contain any definite limit on the amount of common stock which could be issued under the Plan. However, the Company's Articles of Incorporation, at page 6 (appended as Exhibit 1 to the application), indicate that the total common stock authorized is 60 million shares. The Commission believes that, at this time, this will serve as an appropriate limitation to the total common stock outstanding as a result of the approval granted by this order.

The Application also requests that the approval sought be granted for a period to and through June 6, 1999. However, the Commission is not comfortable with authorizing the issuance of such a large amount of securities for this extended period of time. The approval of an issuance of securities by a public utility company necessarily depends upon, and revolves around, the factual circumstances of the Applicant's financial condition at the time the application is made. To simply grant the application for an unconditional ten year time period is to ignore the potential changes in the Company's capitalization and financial condition that the future may bring. This would be inconsistent with the Commission's responsibilities. On the other hand, the Company is entitled to assurances that once approved, the issuance of securities under the Plan will continue to be a viable option for

some foreseeable period of time. To balance these interests, the Commission's approval for the issuance of securities under the Plan will expire on June 6, 1991 (unless of course, issuance has occurred). Prior to this date, the Company may seek reauthorization in order to insure continuity of approval. The Company is also directed to make quarterly reports to the Commission, in the form of the Company's most recent SEC form 10-Q.

Further, the Commission should be notified of any changes to the Plan. This notice should include a short description of the impacts of any such changes (and any required SEC reports detailing such changes), and should be submitted to the Commission within 30 days of the adoption of such changes by the Company.

CONCLUSIONS OF LAW

1. Applicant, the Montana Power Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, is qualified to transact business in the State of Montana, and is operating as a public utility engaged in furnishing electric and natural gas utility service in the State of Montana. Section 69-3-101, MCA.

2. The Commission has jurisdiction over the subject matter of the Application pursuant to Sections 69-3-501 through 69-3-507, MCA, inclusive.

3. The issuance of Preferred Shares and Common Shares in the manner described in the Application and as hereinafter authorized will be for a lawful purpose and is consistent with the public interest. Section 69-3-504, MCA.

4. The amount of securities outstanding and proposed to be outstanding, in the aggregate, does not exceed the fair value of the properties and business of the Applicant. Section 69-3-504(3), MCA.

5. Adequate notice of the filing of the Application has been provided and due consideration has been given to the matters presented and filed in connection herewith.

6. The Application seeking authority to issue that number, not to exceed 600,000, of shares of Preferred Shares, and of Common Shares which, in each case, may be required to permit the exercise and exchange of the Rights pursuant to the Plan, and to do any and all other things not contrary to law or the rules and regulations of the Commission incidental and necessary to the performance of such authorized acts, should be approved, as modified by the determinations in this Order.

7. The Application, as modified by this Order, complies with Sections 69-3-501 through 69-3-507, MCA, inclusive, and should be granted as hereinafter ordered.

ORDER

NOW, THEREFORE, at a session of the Public Service Commission of the State of Montana, held in its office at 2701 Prospect Avenue, Helena, Montana, on July 24, 1989, there regularly came this before the Commission for final action the matters and things in this docket. The Commission being fully advised in the premises makes and enters the following Orders:

IT IS ORDERED that the Applicant, the Montana Power Company, is hereby authorized to issue up to and including 600,000 Preferred Shares in the manner and for the purposes described in the Application and Exhibits thereto in this docket, to and through June 6, 1991, subject to the provisions of this Order, pursuant to Sections 69-3-501 through 69-3-507, MCA, inclusive.

IT IS FURTHER ORDERED that the Applicant, the Montana Power Company, is hereby authorized to issue Common Shares in the manner and for the purposes described in the Application and Exhibits thereto in this docket, to and through June 6, 1991, subject to the provisions of this Order, pursuant to Sections 69-3-501 through 69-

3-507, MCA, inclusive. Such total amount of common shares of the Company outstanding, after the proposed issuance, not to exceed 60 million, as currently provided for in the Company's Articles of Incorporation.

IT IS FURTHER ORDERED that the Applicant is authorized to do any and all other things not contrary to law or the rules and regulations of this Commission incidental and necessary to the performance of any and all acts specifically authorized herein.

IT IS FURTHER ORDERED that within thirty (30) days of the completion of the sale of the Preferred Shares and Common Shares authorized herein, Applicant shall furnish to the Commission a report including the number of such Shares sold, the average price of such Preferred Shares and of such Common Shares, and the net proceedings from the sales. Applicant shall also comply with the additional reporting requirements imposed by this Order.

IT IS FURTHER ORDERED that the foregoing authorization is without prejudice to the regulatory authority of this Commission with respect to rates, service, accounts, valuations, estimates or determinations of cost, or any other matter subject to its jurisdiction as provided by law.

IT IS FURTHER ORDERED that nothing in this Order or any act or deed done and performed in connection herewith shall be construed

to obligate the State of Montana to pay or guarantee in any manner whatsoever any security authorized by this Order or authorized, issued, assumed, or guaranteed under the provisions of Sections 69-3-501 through 69-3-507, MCA, inclusive.

IT IS FURTHER ORDERED that this Order shall be effective July 24, 1989.

Issuance of this Order does not mean acceptance of the Applicant's exhibits or other material accompanying the Application for any purpose other than in connection with this proceeding.

Done and Dated this 24th day of July, 1989 by a 5-0 vote.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.